

STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 01-AFC-17
	)	
Application For Certification of the	)	COMMISSION STAFF'S
Inland Empire Energy Center, LLC	)	RESPONSES TO COMMITTEE
	)	QUESTIONS
_____	)	

As ordered by the Committee in its "Supplemental Briefing Order," dated October 14, 2003, the Energy Commission Staff ("Staff") offers its responses to the questions posed in the Committee's Order. Because all questions, except questions 4 and 6 in the Committee's Order, call for factual information, Staff assumes the evidentiary record will be reopened to accept such information as testimony and allow for cross examination. Doing so will allow the factual information to become a part of the evidentiary record on which the Committee may properly rely to make its findings and reach its conclusions. (Cal. Code Regs., tit. 20, § 1751.) Allowing for cross examination will help establish the accuracy of the parties' responses. For these reasons, Staff is ready to sponsor the factual information of its responses into the record and be subject to cross examination on them, specifically responses 1, 2, 3, and 5. For convenience, we repeat the questions posed in the Order, followed by our responses.

- 1. Explain how the RECLAIM program works, i.e., registering RECLAIM trading credits (RTCs), purchase requirements, timelines (are the RTCs effective for the life of the project?; how long does the process take to complete the purchase process?), and expiration of RECLAIM program.*

The following information is based in part upon a review of the South Coast Air Quality Management District (SCAQMD or District) website,<sup>1</sup> the Annual RECLAIM Audit,<sup>2</sup> and District Rules and Regulations and consultation with District staff.

The RECLAIM program allocated RECLAIM Trading Credits (RTCs) to facilities existing in 1994 based on the amount of emissions allowed by their existing permits. RTCs were assigned based on past peak operations and the requirements of existing rules and control measures. RTCs are designated by compliance year and can be bought or sold for use within that year. Facilities must hold RTCs equal to their actual emissions

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<sup>1</sup> <http://www.aqmd.gov/reclaim/reclaim.html>, accessed October 2003.

<sup>2</sup> Annual RECLAIM Audit Report for the 2001 Compliance Year, South Coast Air Quality Management District, March 1, 2003.

during the compliance year. They can sell excess credits to other facility operators who require them in order to offset their emissions.

The District maintains a registry of all parties holding credits. RECLAIM required that total emissions from all participants be reduced each year from its inception through 2003. After 2003, a fixed number (approximately 12,600 tons of NOx per year) of RTCs will be available for use or trading.

The RECLAIM program does not expire. The RTC allocations are perpetual. They may be owned by different entities during different years and an entity's ability to emit may "expire" because it does not possess RTCs for the following year. The ability to emit will, however, continue on with its new holder. The RECLAIM program continues indefinitely, subject, of course, as is any regulation, to amendment by the District.<sup>3</sup>

New sources that are subject to the RECLAIM program, including this project, must acquire credits from the owners of existing RTCs. In each year between 1994 and 2001, an average of 195 tons per year of new NOx emission sources were offset with RTCs purchased or traded from existing sources. Those new participants in the RECLAIM market must purchase RTCs for each and every subsequent year of operation.<sup>4</sup>

Purchasing credits involves a transfer of RTCs between accounts in the District registry. Accounts can be held by operating facilities and brokers. The persons authorized by companies to conduct RTC transactions and trading activity must be registered with the District. The District makes the information about trading activity available to the public, providing buyers and sellers with information about each other and information on recent market prices. The District's processing of transactions can be completed in two to five days, depending on the number of parties and brokers involved.

Before operating, a new facility operator must demonstrate that it holds sufficient RTCs to offset total facility emissions for the first year of operation (Rule 2005(b)(2)). At the beginning of each subsequent year, the demonstration must be repeated. Facilities must reconcile emissions and RTCs each quarter. Operating with emissions exceeding the amount of RTCs one holds is a violation of District rules.

*2. In order for Applicant to secure the requisite amount of RECLAIM Trading Credits (RTCs) before plant operation, will the Applicant need to purchase the RTCs from a third party/parties rather than from the District's RECLAIM registry? If so, what guarantees currently exist to ensure that the appropriate RTCs will be available at operation?*

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<sup>3</sup> A future effort to further reduce total NOx RTC allocations, similar to the reductions mandated through 2003, is possible. The District is not yet in attainment for NOx. Chapter 4 of the 2003 District Air Quality Management Plan (<http://www.aqmd.gov/aqmp/AQMD03AQMP.htm>) describes "additional NOx reductions for RECLAIM" as a potential tool for achieving attainment.

<sup>4</sup> In this case the applicant is required to obtain approximately 245 tons of RTCs for the first year of operation and 175 tons for succeeding years. The first year's amount is greater to account for commissioning emissions.

While the District has accumulated an inventory of PM<sub>10</sub> and SOx emission reduction credits in its Priority Reserve, it possesses no similar inventory of RTCs from which to supply the applicant. The RECLAIM registry is simply a record of transactions and current ownership of RTCs. The applicant will, therefore, have to purchase the necessary RTCs in the competitive market. No RTC holder is compelled to sell to it. There is no guarantee that the required RTCs will continue to be available for purchase. Thus, the applicant cannot guarantee that it will be able to find and purchase the necessary RTCs unless it either purchases them now or purchases an option to purchase them at a later time.<sup>5</sup>

3. *If the project is constructed and RTCs cannot be purchased and other ERCs are not available, and the IEEC cannot obtain a Permit to Operate from the Air District, what will the impacts be to the environment? Will the IEEC be able to operate? If so, under what circumstances?*

Without the necessary RTCs, the project cannot operate unless some special dispensation is provided. Operating without the RTCs would violate local, state and federal air quality laws and cause significant environmental impacts due to the emission of NOx without offsets. The circumstances under which special dispensation would be granted are speculative but would likely involve a serious energy emergency.

Staff does not anticipate that any significant environmental impacts would result from the inability of the facility to operate. That situation would be similar to the closure of the facility, an eventuality discussed in the Final Staff Assessment.

If the question is whether impacts from a reduction in electricity supplies due to this plant's inability to operate would justify providing relief from the requirement to obtain offsets for the project's emissions, we are aware of no authority for making such a determination either now or at a future time.

4. *Does Staff need to have the RTCs identified more specifically in order to complete its CEQA analysis and if so, why?*

Staff's CEQA analysis assumes that the applicant will obtain the NOx RTCs as required by Condition AQ-46 and District Rules 2004(d) and 2005(b)(2). Due to the nature and strict requirements of the RECLAIM program, staff does not need to examine the details of specific RTCs in order to complete its CEQA analysis.

Staff's contention that specific RTCs must be identified along with an assurance that they can and will be obtained by the time required under District rules is derived from the requirements of Public Resources Code Section 25523(d), not from its CEQA analysis. Identification is a statutory issue, not a CEQA issue.

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<sup>5</sup> Staff is requesting only that the RTCs necessary for the first year of operation, not the entire operating life of the project, be identified and the ability to purchase them at the required time be assured by an option or equivalent contract.

5. *Has the Energy Commission certified any other power plant projects in which the air emission offset package was not completely identified or in which offsets were not secured prior to certification? Please list projects and be specific about the circumstances of each case. If the offsets were not secured, but identified, please explain how those offsets were identified.*

As required by the Warren-Alquist Act, every applicant must identify a complete offset package prior to the licensing of the project. To our knowledge, staff has not recommended certification of any project with an air emission offset package that is not completely identified. In many cases, staff has recommended certification of projects where identified offsets are subject to an option to purchase but have not yet been acquired, an acceptable approach under Section 25523 and all that staff is requesting in this case.

The identification of offsets is usually addressed by the local air pollution control districts in the process of preparing the determination of compliance. In the Final Determination of Compliance for IEEC (March 2003), the District showed that IEEC had acquired less than ten percent of the NOx offsets required. Consequently, the District lacks sufficient information to certify that "complete emissions offsets for the proposed project have been identified" and the Commission, therefore, may not make the finding of conformance with applicable air quality standards that is necessary for licensing the project. (Public Resources Code § 25523(d).)

Most local air pollution control districts require that all emission reduction credits be under the applicant's control or obtained prior to the issuance of the Permit to Construct. This is true with SCAQMD except for NOx RTCs, which must be possessed prior to operation. And, in the other SCAQMD power plant cases to date, the applicants have shown ownership or options to purchase all of the necessary RTCs prior to approval by the Energy Commission.

The specific situations of some other recent projects are:

Magnolia Power Plant (Burbank, SCAQMD)--At the time of the Commission decision (March 5, 2003, 01-AFC-6), the applicant had demonstrated that it had agreements to purchase all necessary RTCs.

Malburg Generating Station (Vernon, SCAQMD)--The applicant had obtained all offsets prior to the Commission decision on that case (May 28, 2003, 01-AFC-25).

El Segundo Power Redevelopment Project (El Segundo, SCAQMD)--The applicant identified and acquired sufficient RTCs to mitigate the NOx emissions on an annual basis before the Final Staff Assessment (September 2002, 00-AFC-14). As we explained in our Reply Brief, prior staff testimony has been confused on this point, mixing a concern about daily peak emissions exceeding the daily average amount of RTCs. The daily variations, however, are not relevant to a determination of compliance

with District rules which require reconciliation on a quarterly, not daily, basis (District Rule 2004(b)).

Huntington Beach Generating Station Retool Project (Huntington Beach, SCAQMD)--At the time of the Staff Assessment (March 9, 2001, 00-AFC-13), the applicant possessed RTCs in a sufficient quantity to allow approximately 2,500 hours per year of operation for Units 3 and 4. Staff proposed a Condition of Certification to require that the owner obtain additional RTCs or be limited to 2,500 hours of operation. The Commission decision eliminated the operational limit but required that sufficient RTCs be held to offset the emissions.<sup>6</sup>

Mountainview Power Plant Project (Redlands, SCAQMD)--The applicant for the Mountainview Power Plant Project had obtained a sufficient quantity of RTCs at the time of the Staff Assessment (December 27, 2000, 00-AFC-2).

Palomar Energy Project (Escondido, San Diego APCD)--The Commission decision (August 6, 2003, 01-AFC-24) includes an emission cap to curtail NO<sub>x</sub> emissions to approximately 84 percent of those originally proposed. With the emission cap in place, the applicant either acquired, or identified with contract agreements, sufficient ERCs to completely offset the project. The cap allows partial operation of the facility as long as emissions remain below the levels of the identified ERCs.

*6. Discuss the relevance of cost in determining whether the project complies with applicable law, i.e., CEQA.*

Cost can be a factor in determining whether a proposed mitigation measure is “feasible” under CEQA. Public Resources Code section 21081. Cost can also be a factor in applying state water policies to decide among various sources of cooling water. See, e.g., Water Code section 13550. Neither issue is presented in this matter.

Cost has no place, however, in determining whether sufficient offsets have been identified by an applicant under Section 25523(d)(2) or whether such offsets must be provided under District rules. Those laws do not allow exceptions based on the cost of compliance.

Finally, the Order “further orders the Applicant to submit to the Committee a letter from the South Coast Air Quality Management District certifying that complete emissions offsets (including RTCs) have been identified pursuant to Public Resources Code § 25523(d)(2).” The District has responded to this request, in a letter dated October 22, 2003 from Pang Mueller to Hearing Officer Willis, as follows:

As the Commission is aware, the requirement that “complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant within the time required by the district’s rules” is contained in the Commission’s

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<sup>6</sup> The Huntington Beach case occurred during the state’s energy emergency and was processed under Governor’s Executive Orders D-22-01 (February 8, 2001) and D-28-01 (March 7, 2001).

enabling statutes, and there is no corresponding provision in SCAQMD regulations or enabling statutes. Therefore, the District can certify, based on the information provided to the District through IEEC's application to the District (and related submittals), that to the extent required under SCAQMD regulations, complete emissions offsets for the Inland Empire Energy Center have been identified and will be obtained by the applicant within the time required by the District's rules.

This statement by the District does not satisfy the requirements of Public Resources Code section 25523(d)(2), which provides, in relevant part:

The commission may not find that the proposed facility conforms with applicable air quality standards pursuant to paragraph (1) unless the applicable air pollution control district or air quality management district certifies, prior to the licensing of the project by the commission, that complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant within the time required by the district's rules. . . .

As we have discussed previously, staff interprets Section 25523 to require that offsets be specifically identified as to the identity of the seller, quantity and other relevant information and an option or completed purchase is necessary to demonstrate that those identified offsets will be obtained by the time required under District rules. The District's FDOC indicates that the applicant has specifically identified only ten percent of the required NOx RTCs.

The District reminds us in its letter that the District's rules and enabling laws do not contain requirements similar to those in Section 25523. It then concludes that the applicant has identified offsets "to the extent required under [District] regulations." The District's regulations, however, do not require any identification or possession of RTCs until just before the start of operation. Read with that regulatory fact in mind, then, the District's letter does not provide the certification required by Section 25523. It says, in effect, that all of the offsets that must be identified to the District under its rules at this time have been identified. What it thus fails to say is that the offsets that must be possessed before the plant can begin operations have all been identified as required by Section 25523 and will be obtained by the time required under District rules.

Staff remains of the opinion that the identification of "complete emissions offsets for the proposed facility" has not been made for the reasons described above and in our previous briefs and testimony. Until that deficiency is rectified, we cannot recommend approval of this project.

DATED: October 24, 2003

Respectfully submitted,

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Senior Staff Counsel